PP v. CHEONG TECK PAW

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[CRIMINAL TRIAL NO: WA-45A-33-09-2020]
17 OCTOBER 2023

Abstract – *The role of an investigating officer is significant, in that, an investigating officer has an onerous responsibility to investigate all aspects of the investigation fairly, not only one that favours the prosecution, but also those in favour of an accused person. An accused person could not be penalised for the lack of ingenuity in investigation. Thus, the failure to investigate or call a material witness, who is important to unfold the narrative of the prosecution's case, is fatal and would create a material gap in the prosecution's case, which would result in an acquittal of the accused person.*

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Trafficking in dangerous drugs – Possession – Whether custody or control sufficient to establish possession – Whether physical act or custody must be accompanied with knowledge of drugs – Whether mere knowledge without exclusivity of physical custody or control or both sufficient to constitute possession – Whether failure to investigate created gap in prosecution's case – Whether incomplete investigation and failure to investigate warranted acquittal and discharge of accused person*

CRIMINAL PROCEDURE: *Prosecution – Gap in evidence – Offence under Dangerous Drugs Act 1952 – Trafficking in dangerous drugs – Whether possession established – Whether physical act or custody must be accompanied with knowledge of drugs – Whether mere knowledge without exclusivity of physical custody or control or both sufficient to constitute possession – Whether failure to investigate created gap in prosecution's case – Whether incomplete investigation and failure to investigate warranted acquittal and discharge of accused person*

The raiding officer ('PW7') and his team from the Narcotic Department, Bukit Aman raided unit A-17-01, an apartment at Pangsapuri Kinrara Mas. There was no contraband found in the unit. The police however found a set of keys in the pocket of the pants worn by the accused. The accused led the police to the 16th floor of the same apartment ('premise') and upon opening the door using the keys found on the accused, PW7 and his team discovered all the drugs and poison forming the subject matter of the charges against the accused. Two days after the accused was arrested, the investigating officer ('PW11') together with the police photographer brought the accused back to the unit A-17-01 for further investigation. PW11 found a 'Dunhill' cigarette box on the sofa at the hall of the unit and found drugs said to be methamphetamine with the gross weight of 5.4g. Upon further inspection, PW11 found four small boxes written as 'Po Chai Pills' in the kitchen

A cabinet which also contained drugs said to be ecstasy with the gross weight of 17.88g. The accused was charged with three charges of trafficking in, respectively, 26,212.2g methamphetamine; 5,846.2g 3,4 methylenedioxymethamphetamine and 2,048.1g ketamine, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The accused was B also charged with possession of 1,236.9g caffeine, an offence punishable under s. 30(5) of the Poisons Act 1952 ('Poisons Act').

Held (acquitting and discharging accused without calling to enter defence):

(1) Custody or control over the said dangerous drugs is insufficient to C establish possession. The physical act or custody must be accompanied with evidence that the accused had knowledge of the drugs and, in the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. D (para 14)

(2) The police received information before the raid was mounted at the premise where the accused lived. The information was a specific information where not only the address was given, the accused's name was also provided. Such evidence was rejected on the ground that this E piece of evidence is hearsay and prejudicial to the accused. This kind of evidence would indicate that the police had been told that the accused was the only one who was involved and therefore he became the only target of arrest. This was further compounded by the fact that the accused's arrest in the present matter was connected with another arrest F where he was charged with three other accused persons in the Shah Alam High Court for trafficking in dangerous drugs. (paras 15-17)

(3) It is imperative on the prosecution to exclude the possibility that other individuals could not have had custody or control of the premise in order to prove possession. Without the explanation as to where the other G set of keys and access card to the premise, there was already a reasonable doubt as to whether the accused alone had the power to exclude any other person from dealing with the dangerous drugs found in the premise when he was not the owner nor a tenant. Custody and control of the premise where the dangerous drugs were found and exclusivity of H possession of the same on the part of the accused were further debunked by the fact that Lee Boon Cheng, the registered tenant of the premise, was not called by the prosecution as their witness. Lee Boon Cheng was a material witness to unfold the narrative of the prosecution case as he would be able to inform the court the nexus between him and the I premise where the dangerous drugs were found and to negate reasonable doubt as to the power of disposal of the dangerous drugs on the part of the accused. (paras 22-25)

(4) To Thi Quyen, a Vietnamese and the wife of the accused, was another material witness, whose evidence would fully unfold the narrative of the prosecution's case in connection with the premise. To Thi Quyen's role was made more important as a material witness to explain the drugs recovered from the unit A-17-01 two days after the accused was arrested, which were not there when the premise was raided. To Thi Quyen was never arrested and there was never an attempt to trace her for the purposes of investigation. Also, no investigation was conducted as to whether To Thi Quyen had a set of keys to the 16th floor. She left Malaysia three days after the accused was arrested. Hence, there was an incomplete investigation and the failure to investigate warranted an acquittal and discharge of the accused. (paras 26-30, 33 & 34)

(5) The failure to investigate To Thi Quyen and Lee Boon Cheng had created a major gap in the prosecution's case and gave rise to more than one inference arising from the same facts. As such, the inference most favourable to the accused must be drawn. Further, the prosecution had failed to prove the element of knowledge on the part of the accused. The act of the accused informing PW7 of the premise and merely took the police to the same without any overt act such as attempting to run *etc*, would only indicate his lack of knowledge of the dangerous drugs kept therein. The gaps in the prosecution case resulted in the prosecution failing to prove the essential ingredient of knowledge and possession on the part of the accused. (paras 37, 39, 41 & 45)

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Azizan Yahaya v. PP [2012] 8 CLJ 405 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 CA ***(refd)***
Bunya Jalong v. PP [2015] 5 CLJ 893 CA ***(refd)***
Chan King Yu v. PP [2009] 1 CLJ 601 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chan Wei Loon v. PP & Another Appeal [2021] 6 CLJ 623 FC ***(refd)***
Ghasem Hozouri Hassan v. PP [2018] 6 CLJ 133 FC ***(refd)***
Ghasem Gharezadehsharbiani Hassan v. PP [2014] 1 LNS 752 CA ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohd Helmi Akmal Mohd Ali lwn. PP [2017] 7 CLJ 666 CA ***(refd)***
PP v. Azmani Che Rose [2011] 1 LNS 1954 CA ***(refd)***
Tengku Adnan Tengku Mansor v. PP [2022] 1 CLJ 917 CA ***(refd)***
Thivasalim Abdul Majeed v. PP [2014] 2 CLJ 963 CA ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1)
Dangerous Drugs Act 1952, s. 39B(1)(a), First Schedule
Poisons Act 1952, s. 30(5)

For the prosecution - Nik Mohd Fadli Nik Azlan; DPP
For the accused - N Sivananthan, Grace Nathan, Nabilah Habib & Aiswarya Devi Chanthirakumar; M/s Sivananthan

Reported by S Barathi

JUDGMENT

Noorin Badaruddin J:

[1] The accused, Cheong Teck Paw was charged with three charges of trafficking in, respectively, 26,212.2g methamphetamine; 5,846.2g 3,4-methylenedioxymethamphetamine and 2,048.1g ketamine. All three charges were made under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The accused was also charged with possession of 1,236.9g caffeine, an offence punishable under s. 30(5) of the Poisons Act 1952 ("Act 366"). The charges were marked as P3, P4, P5 and P6 accordingly.

[2] The charges read as follows:

First Charge

Bahawa kamu pada 27.07.2019 jam lebih kurang 7.00 petang, di A-16-18, Pangsapuri Kinrara Mas, Bukit Jalil, di dalam daerah Cheras, di Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 26,212.2g methamphetamine. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Second Charge

Bahawa kamu pada 27.07.2019 jam lebih kurang 7.00 petang, di A-16-18, Pangsapuri Kinrara Mas, Bukit Jalil, di dalam daerah Cheras, di Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 5,846.2g 3,4-methylenedioxymethamphetamine. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Third Charge

Bahawa kamu pada 27.07.2019 jam lebih kurang 7.00 petang, di A-16-18, Pangsapuri Kinrara Mas, Bukit Jalil, di dalam daerah Cheras, di Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 2,048.1g ketamine. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Fourth Charge

Bahawa kamu pada 27.07.2019 jam lebih kurang 7.00 petang, di A-16-18, Pangsapuri Kinrara Mas, Bukit Jalil, di dalam daerah Cheras, di Wilayah Persekutuan Kuala Lumpur, telah memiliki 1,236.9g caffeine. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 30(3) Akta Racun 1952 yang boleh dihukum di bawah Seksyen 30(5) Akta yang sama.

The Prosecution Case

[3] Briefly, on 27 July 2019 at around 6.20pm, ASP Abdul Hamid bin Ujang (PW7) the raiding officer and his team from the Narcotic Department, Bukit Aman raided unit A-17-01 an apartment at Pangsapuri Kinrara Mas, Jalan Mas 1, Kinrara Mas, Bukit Jalil, Kuala Lumpur. PW7 and his team found no contraband in the said unit. The police, however, found a set of keys in the pocket of the pants worn by the accused and the accused is said to have led the police to the 16th floor of the same apartment at around 7pm. The unit is A-16-18, as stated in all the charges (hereinafter referred to as "the premise") and upon opening the door using the keys found on the accused, PW7 and his team discovered all the drugs and poison forming the subject matter of the charge herein.

[4] On 29 July 2019, two days after the accused was arrested, at around 1pm, the investigating officer ("IO") Inspector Kalidas a/l V Rajakumar (PW11) together with the police photographer D/Kpl Mohd Asrul bin Abdullah (PW1) brought the accused back to the unit A-17-01 for further investigation. One Crystal Chen Ee Wei said to be the accused's sister came to open the door of the said unit and had opened the door for the police to enter. PW11 found a "Dunhill" cigarette box on the sofa at the hall of the said unit and found drugs said to be methamphetamine with the gross weight of 5.4g. Upon further inspection, PW11 found four small boxes written as "Po Chai Pills" in the kitchen cabinet which also contained drugs said to be ecstasy with the gross weight of 17.88g.

[5] In regard to the drugs found at the premise (unit A-16-18), the chemist, Encik Mohd Najif bin Ab Rahman (PW6) testified that they were all dangerous drugs (as per the charges) listed under the First Schedule of the DDA.

Summary Of The Prosecution's Contentions

[6] In essence, it is the submission of the prosecution that the accused was in direct possession of the impugned dangerous drugs as he was the one who had the key and led the police to the premise where the dangerous drugs were found. It is submitted further that, the accused had the requisite knowledge since he knew where the dangerous drugs were and that custody and control are proven since he had the keys to the premise. The accused is said to have known the nature of the drugs and had the power of disposal over the same since he possessed the key to the premise at the time the raid took place.

[7] The prosecution also relied on the CCTV images which they conclude to have shown the act of the accused bringing the drugs in a big bag into the building of the apartment using a trolley where the bag was later confiscated by the police. It is the prosecution's case that the accused had transferred the drugs in the big bag to the premise and the 15 CCTV images documented in P61 match with the investigation conducted by the police. The prosecution submits that, it can therefore be presumed that the accused was trafficking in the dangerous drugs as per the charges.

The Defence

[8] Summarily, on behalf of the accused, it is submitted that from the suggestions and testimonies unchallenged by the prosecution, the arresting officer's/PW7's evidence in relation to the information received must be rejected as it is hearsay and prejudicial to the accused. It is submitted further that there are material gaps in the prosecution's case and the failure on the part of the prosecution to call material witnesses to unfold the narrative of their case is fatal. As such, it is submitted that there is no *prima facie* case established against the accused.

Analysis And Findings

[9] Anchored on the fundamental rule of criminal law and pursuant to s. 180 (1) of the Criminal Procedure Code ("CPC"), it is the duty of this court as a trier of fact to determine at the close of the prosecution case, whether the prosecution had made out a *prima facie* case. In determining whether a *prima facie* case has been made out by the prosecution, it is instructive upon the court to scrutinise those evidence adduced on a maximum yardstick in order to determine whether those strands of evidence have satisfied the legal requirements to support a finding of a *prima facie* case. It becomes necessary as well for this court to consider the gaps and inferences that arose from the circumstantial evidence, in accordance with the principles of the law. On the totality of the evidence in the prosecution case, this court must then ask whether it would be prepared to convict the accused if it were to decide to call upon the accused to enter his defence if the accused had elected to remain silent. If the answer to that question is in the negative, then no *prima facie* case would have been made out and the accused would be entitled to an acquittal (see: *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and *Balachandran v. PP* [2005] 1 CLJ 85).

[10] At this stage, the prosecution has to prove the following essential ingredients in order to prove the offence in the charges under s. 39B(1) of the DDA:

(i) the drugs are dangerous drugs listed in the First Schedule of the DDA with net weight as specified in the charge;

(ii) the drugs was in the possession of accused at the relevant time; and

(iii) the accused committed the act of trafficking at the relevant time.

[11] In regard to the offence contained in the fourth charge, the prosecution has to prove:

(i) caffeine found is poison under the Act 366; and

(ii) it was found in possession of the accused at the relevant time.

The First Ingredient – The Identity Of The Drugs

[12] In regard to the first element of the charge, apart from there being no challenge by the accused, this court is satisfied that nothing is inherently incredible in respect of the chemist's (PW6) evidence relating to the identity of the drugs stated in the charges that they are dangerous drugs and poison under the Schedules of the DDA.

The Second Ingredient – Possession And Knowledge

[13] Guided by the authorities on possession of dangerous drugs, the court has to determine whether the accused had possession and knowledge of the nature of the thing possessed. In other words, a physical element and a mental element must both be present before possession under the law is made out. It must also be shown that he had the *animus possidendi*; the intention of dealing with the dangerous drugs as if it belonged to him should he see any occasion to do so (see: *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237).

[14] It is trite law that custody or control over the said dangerous drugs is insufficient to establish possession. The physical act or custody must be accompanied with evidence that the accused had knowledge of the said drugs and in the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking (see: *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 FC).

[15] So, here is the case where the police received information before the raid was mounted at the premise where the accused lived. The information was a specific information where not only the address was given, the accused's name was also provided. The information as stated in PW7's witness statement is as follows:

> 2. Pada 27/07/2019 jam lebih kurang 9.00 pagi ketika berada di Pejabat Unit Risikan Zon 1, JSJN Bukit Aman, saya telah menerima taklimat daripada ASP G/18815 Faznul Subhi bin Musa sebagai Pegawai Projek, mengenai aktiviti pengedarah dadah melibatkan seorang lelaki cina nama Cheong Teck Paw, Kpt: 710726-10-6549, yang tinggal di alamat A-17-01, Pangsapuri Kinrara Mas, Jalan Mas 1, Kinrara Mas, Bukit Jalil, 58200 Kuala Lumpur.

[16] This court rejects such evidence on the ground that this piece of evidence is hearsay and prejudicial to the accused. There is nothing objectionable about the police acting on information and took certain steps in the investigation, but this kind of evidence would indicate that the police had been told that the accused was the only one who was involved and therefore, he became the only target of arrest. In *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209, the Federal Court had dealt with the evidence in relation to the information received by the police. The court stated:

> *The penultimate point which arose for consideration concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence, to wit, that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he had mounted the road block to stop and search the car driven by the appellant; more particularly, he said this, 'I informed them [his men] that information had been received that a certain Indian would be travelling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah, proceeding from kawasan Permatang Bendahari towards Pulau Pinang.' Now, this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object.*

In *Vijayaratnam v. PP* [1926] 28 MLJ 106, M Hashim J had to consider a similar point, and went so far as to say (at p 106 col 2D):

> *I think, if possible, the expression 'on information received' should not be used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay, to the police and the police act on this information. In this particular case, the police witness went on to say that on arrival at the scene, he laid an ambush. This statement, read in conjunction with the expression 'on information received', would tend to indicate that the police had been told that an offence would be committed. In my opinion, this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the court against the appellant.* To put it in another way, there was a probability that the court trying the appellant was, to a certain extent, influenced by the opening statement of the police witness. In my opinion, such a state of affairs should be avoided.

Whilst we agree with much of what M Hashim J said in that case, we consider that in appropriate circumstances, there is nothing objectionable in a law enforcement officer saying, by way of introduction that, 'acting on information received', he took certain steps in the investigation. However, when such testimony is given, care must be taken not to divulge the contents of the information, as happened in the present case, since this may well be open to the objection that it is hearsay and, in all probability, prejudicial to the accused. Moreover, we must mention that in trials for any offence under the Act, sub-ss. (1) and (2) of s. 40 provide for special rules of evidence relating to the protection of informers – but

note the exception provided for under sub-s. (3) of s. 40. *Although the judge had not referred to that part of ASP Abdul Wahab's testimony, quoted above, the possibility that he was swayed by it could not be ruled out (see Balasingham v. PP [1959] MLJ 193 at p 194, col 2F to H, per Ismail Khan J (later CJ Borneo), and its effect might well have been to prejudice the case for the appellant.*

(emphasis added)

[17] The principle enunciated by the Federal Court above was reiterated and upheld in *Chan King Yu v. PP* [2009] 1 CLJ 601; [2009] 1 MLJ 457 where the Federal Court again stated:

L/Cpl Samsudin bin Jantan (PW4) in his evidence stated as follows:

ASP Giam memberitahu siapanya suspek, iaitu, satu lelaki Cina bernama Chan King Yu rakyat Hong Kong berada di sekitar Kuala Lumpur. Pemerhatian ini adalah berkenaan kegiatan pengedaran dadah. Arahan adalah buat pemerhatian di Hotel Nova, Jalan Bukit Bintang. Lepas itu, saya lihat satu lelaki bangsa Cina seperti deskripsi yang diberi oleh ASP Giam melalui gambar yang ia beri turun dari Hotel Nova.

[73] L/Cpl Abdul Halim bin Basri (PW5) in his evidence stated as follows:

(i) Operasi yang diketuai oleh ASP Giam untuk membuat tangkapan ke atas seorang lelaki Cina rakyat Hong Kong di sebuah hotel di Jalan Alor, Bukit Bintang. Ia Hotel Nova.

(ii) ASP Giam arah untuk standby kerana ada maklumat seorang bangsa Cina lelaki rakyat Hong Kong ada membawa dadah jenis syabu ke kawasan Bukit Bintang. Masa taklimat saya diberitahu ada orang akan membawa syabu.

[74] The learned trial judge in his judgment on this issue of acting on information received had stated as follows:

Keterangan menunjukkan tertuduh adalah sasaran pihak polis dalam operasi ini dari sejak awal. Pihak polis telah menerima maklumat bahawa seorang lelaki Cina dari Hong Kong akan mengedar dadah 'syabu' pada hari itu dan telah menerima salinan portret tertuduh. The Court of Appeal in its judgment had also likewise stated as follows:

On the morning of 19 June 2000 ASP Giam Kar Hoon (PW7) from the Narcotics Division of Bukit Aman received information that a Chinese male from Hong Kong by the name of Chang King Yu would be trafficking in dangerous drug at a hotel in Kuala Lumpur on that day.

[75] *I am of the view from the above quoted findings in the judgment of the courts it can be said that both the High Court and the Court of Appeal had acted on statements which were clearly hearsay and prejudicial to the appellant and therefore inadmissible. On this point I would like to refer to the case of Alcontara a/l Ambross Anthony v. Public Prosecutor [1996] 1 MLJ 209 (FC)* wherein Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court had this to say:

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> The penultimate point which arose from consideration concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence to wit that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he had mounted the road block to stop and search the car driven by the appellant; more particularly, he said this 'I informed them (his men) that information had been received that a certain Indian would be travelling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah proceeding from Kawasan Permatang Bendahari towards Pulau Pinang.' Now this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object. (emphasis added)

[18] The Court of Appeal in *Mohd Helmi Akmal Mohd Ali lwn. PP* [2017] 7 CLJ 666; [2017] 5 MLJ 235, adopted the same principle and stated in the following:

> [24] Mengenai alasan rayuan pertama, pengaduan (complaint) peguambela terpelajar adalah terhadap penerimaan masuk keterangan berkaitan penangkapan terhadap perayu hasil daripada maklumat orang awam yang menyatakan bahawa seorang yang bernama 'Mi' yang tinggal di alamat rumah tempat kejadian telah menjalankan aktiviti pengedaran dadah. Peguambela menghujahkan bahawa keterangan tersebut adalah merupakan keterangan dengar cakap dan memprejudiskan kepada perayu. Peguambela berpegang kepada prinsip yang telah diputuskan dalam kes *Chan King Yu v. Public Prosecutor* [2009] 1 MLJ 457 dan *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 3 MLJ 1.
>
> [25] *Kami bersetuju dengan prinsip undang-undang yang telah diputuskan dalam nas-nas yang telah dirujuk oleh peguambela terpelajar bahawa keterangan berkaitan maklumat awam yang diterima oleh pegawai serbuan sebelum tangkapan dan rampasan dadah dilakukan adalah keterangan dengar cakap dan bersifat prejudis terhadap perayu dan oleh itu tidak boleh diterima.* (emphasis added)

[19] In rejecting the evidence stated earlier, this court is further compounded by the fact that the accused's arrest in the present matter is connected with another arrest where he was charged with three other accused in the Shah Alam High Court for trafficking in dangerous drugs. Exhibit D73 is the consent by the Public Prosecutor in regard to the charge in the Shah Alam High Court. PW7 affirmed the arrest leading to the charge in the Shah Alam High Court was part of the same operation that led to the accused's arrest in this case.

[20] In cross-examination, PW7 further affirmed that in the Shah Alam High Court, the accused was acquitted at the close of the prosecution's case and one of the other accused was directed to enter his defence. The fact that the accused was arrested in connection with one other arrest involving three other accused in the same operation and that he was acquitted at the *prima facie* stage by the Shah Alam High Court makes the evidence relating to the information received by the police before the raid in the present matter took place, prejudicial to the accused more so, when the premise where the impugned dangerous drugs were found situated on the 16th floor of the apartment did not belong to the accused and neither was the accused a tenant therein.

[21] No personal item belonging the accused was found in the premise. PW3, the agent for the owner of the premise testified that the person whom he dealt with relating to the tenancy of the premise was one Lee Boon Cheng whom he saw twice for the purpose of renting the premise on the 16th floor of the apartment. PW3 confirmed that Lee Boon Cheng was not the same person as the accused. PW4 the tenant agent further confirmed that only Lee Boon Cheng attended the viewing of the premise and two access card and ten keys to the premise were handed over to Lee Boon Cheng. The evidence led by the prosecution revealed that only two keys were recovered from the accused and no explanation was given by PW11, the IO or PW7 the raiding officer as to where the other keys and access cards were.

[22] Consequently, here lies the loophole in the prosecution's case. There was no investigation sufficiently done to address the issue of exclusivity of the premise and the dangerous drugs said to be in possession of the accused. Without the explanation as to where the other set of keys and access card to the premise, there is already a reasonable doubt as to whether the accused alone has the power to exclude any other person from dealing with the dangerous drugs found in the premise when he is not the owner nor a tenant. In addressing the issue of exclusive access to the drugs, the Court of Appeal in *PP v. Azmani Che Rose* [2011] 1 LNS 1954, found as follows:

> *Walaupun Azmani adalah orang yang menyewa rumah tersebut, kemungkinan bahawa bilik A (di mana ketulan mampat cannabis ditemui) adalah bilik Halim atau sekurang-kurangnya bilik yang Halim mempunyai akses tidak dapat ditolak. Dalam keadaan yang sedemikian itu, timbul keraguan yang munasabah sama ada Halim (bukan Azmani) yang mempunyai kuasa untuk mengenepikan orang lain dari berurusan dengan dua ketulan mampat ganja tersebut Ertinya, terdapat keraguan yang munasabah sama ada Azmani memiliki dadah tersebut.* Oleh kerana terdapat keraguan yang munasabah dalam kes pihak pendakwaan sendiri maka satu kes *prima facie* telah gagal dibuktikan oleh pihak pendakwaan (lihat *Balachandran v. PP* [2005] 1 CLJ 85.
>
> (emphasis added)

[23] It is imperative on the prosecution to exclude the possibility that other individuals could not have had custody or control of the premise in order to prove possession. The onus is not on the defence to prove possibility of access by others to the dangerous drugs (see: *Thivasalim Abdul Majeed v. PP* [2014] 2 CLJ 963; [2014] 3 MLJ 124; *Chan Wei Loon v. PP & Another Appeal* [2021] 6 CLJ 623; [2021] 4 MLJ 660).

[24] Custody and control of the premise where the dangerous drugs were found and exclusivity of possession of the same on the part of the accused are further debunked by the fact that Lee Boon Cheng, the registered tenant of the premise was not called by the prosecution as their witness. P12 is the "offer to rent" of the premise to Lee Boon Cheng. P13 is the tenancy agreement of the premise together with the identification card of Lee Boon Cheng evidencing that Lee Boon Cheng is the tenant of the premise. Lee Boon Cheng is a real character and this is further confirmed by Cheah Chor Chuan, the owner of the premise (PW2). PW2 testified that he had met Lee Boon Cheng. PW3 and PW4 both as agents for the owner of the premise and tenant accordingly, gave unchallenged evidence that they had met Lee Boon Cheng twice in the process of getting the premise rented. PW3's evidence that the person in the identification card P13 where the copy of the same was received by her is the same person as the man she saw twice. PW3's evidence on this aspect has not been challenged by the prosecution.

[25] PW4 further testified that Lee Boon Cheng was the person who called him and had requested for PW4 to look for a unit of apartment for him (Lee Boon Cheng) to rent and Lee Boon Cheng was taken to view the premise. This was confirmed by PW3. It must be repeated that two access cards and ten keys to the premise were handed over to Lee Boon Cheng. In contrast, only two keys were recovered from the accused. This court finds that Lee Boon Cheng is a material witness to unfold the narrative of the prosecution case as he would be able to inform the court the nexus between him and the premise where the dangerous drugs were found and to negate reasonable doubt as to the power of disposal of the dangerous drugs on the part of the accused. This, even the prosecution witness, PW7 the arresting officer agrees. However, no statement was recorded from Lee Boon Cheng. According to PW11, the IO, Lee Boon Cheng cannot be traced.

[26] Then, there is another character in the form of To Thi Quyen, a Vietnamese and who is not disputed to be the accused's wife. Ng Shuik Yoen (PW8) is the registered owner for the mobile number 012-6800976. PW8 testified that To Thi Quyen had worked together with her before. Again, To Thi Quyen cannot be said to be a fictitious character. It is an unchallenged evidence that To Thi Quyen had requested PW8 to purchase the mobile number 012-6800976 for her child. PW8 testified that upon purchasing the mobile number 012-6800976, she met To Thi Quyen in Puchong and had handed over the sim card of the same number to To Thi Quyen. It is again

an unchallenged evidence that To Thi Quyen had used the same mobile number to contact PW8. It is pertinent to note that the same mobile number is registered as the mobile number of the tenant of the premise (see: First Schedule to exh. P13).

[27] At this juncture it is apposite to note that it is the accused's version that the premise was rented by his wife, To Thi Quyen as she was planning to move out from the unit A-17-01 (where the accused was arrested) to the premise on the 16th floor as both the accused and To Thi Quyen were having some marital problems. It must be borne in mind that no personal items belonging to the accused were found in the premise. This court finds that To Thi Quyen is another material witness and her evidence will fully unfold the narrative of the prosecution's case in connection with the premise.

[28] To Thi Quyen's role is made more important as a material witness to explain the drugs recovered from the unit A-17-01 two days after the accused was arrested. PW7 as the arresting officer has given unchallenged testimony that the To Thi Quyen is a material witness. He testified:

> Q: Jadi saya cadangkan sekali untuk kes ini, kehadiran isteri kepada OKT di mahkamah untuk memberi keterangan adalah sangat penting sebab hanya dia yang boleh menjelaskan bagaimana dadah tersebut boleh berada di unit 17-01. Sebab OKT dalam tahanan polis kan, hanya dia boleh beritahu mahkamah macam mana dadah boleh sampai ke situ, setuju?
>
> A: Setuju Yang Arif
>
> Q: Jadi peranan isteri OKT dalam kes ini dengan dadah yang dijumpai di tempat tinggal beliau pun hanya dia boleh beritahu mahkamah, betul, dia yang boleh beritahu mahkamah bagaimana dadah itu sampai ke situ?
>
> A: Di mana, Yang Arif?
>
> Q: Di unit 17-01, dua hari selepas tangkapan OKT
>
> A: Isteri yang tahu, Yang Arif.

[29] It is an accepted fact that To Thi Quyen was living in the unit A-17- 01 and when unit A-17-01 was raided she was in the said unit together with her child when the accused was arrested. PW7 affirmed that To Thi Quyen did say that she was the accused's wife. Exhibit D75 (drug seizure report) confirmed that the dangerous drugs (methamphetamine) were found in unit A-17-01 on 29 July 2019, two days after the arrest of the accused. It is also unchallenged that these drugs were not there when PW7 raided unit A-17-01 on 27 July 2019. PW7 testified:

> Q: A-17-01 Pangsapuri Kinrara Mas adakah apa-apa dadah yang dijumpai di situ
>
> A: Semasa saya buat tangkapan, tiada menjumpai bahan-bahan dadah Yang Arif

A

Q: Kamu ada buat pemeriksaan unit 17-01

A: Ada Yang Arif

Q: Ada jumpa apa-apa dadah

A: Saya tidak jumpa, Yang Arif.

B

[30] To make matters more dubious, To Thi Quyen then left Malaysia three days after the accused was arrested (see exh. D74). This court finds that it is safe to infer that To Thi Quyen was the real trafficker/owner of the dangerous drugs/poison.

C

[31] The *dicta* postulated in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169 known as the *Radhi* direction can be applied herein. In *Ghasem Hozouri Hassan v. PP* [2018] 6 CLJ 133; [2019] 6 MLJ 231, the Federal Court explained:

D

> [62] The *dicta*, postulated in *Mohamed Radhi*, which is now known as the *Radhi* direction is sort of a direction the trial judge administers unto himself when the accused person invokes the defence which demonstrates the presence of another person at the scene of crime who is the trafficker as opposed to the accused person who is entirely innocent ...

E

[32] In *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773; [2008] 6 MLJ 222, the Court of Appeal had also explained as follows:

> [12] The section is relevant to the present case in the following way. In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v. Public Prosecutor* [1991] 3 MLJ 169. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v. Public Prosecutor* [1995] 1 MLJ 538.

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[33] Again, despite the significance of To Thi Quyen demonstrated in the above, To Thi Quyen was never arrested and in cross-examination, PW11 the IO admits that he did not even attempt to trace her for purposes of investigation. PW11 further testified that no investigation was conducted to see whether To Thi Quyen has a set of keys to the 16th floor.

I

[34] This court finds that in the absence of a credible explanation as to why there was no investigation, the failure to investigate by PW11 as the investigating officer warrants an acquittal and discharge of the accused. The investigation done in this case was not only done casually but was also based on a catch load investigation. It is the finding of this court that there is an incomplete investigation herein. A complete investigation is one that includes investigation of the defence that crop up from the investigation and such investigation would eliminate the gaps or weaknesses and provide substance to be tested against defences when raised (see: *Bunya Jalong v. PP* [2015] 5 CLJ 893; [2015] 5 MLJ 72).

[35] A complete investigation is important to ensure that there would be no gap or weak links in the prosecution case more so in capital punishment cases which must be carried out dispassionately. The Federal Court in *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1 commented as follows:

> [42] Before parting with the case, it is necessary to state that from the facts and circumstances of this appeal it would appear to us that the investigation had been somewhat shoddy. Undoubtedly, heinous crimes are committed under great secrecy and that investigation of a crime is a difficult and tedious task. At the same time the life and personal liberty of a citizen is a precious one guaranteed by art. 5 of the Federal Constitution and its deprivation shall be only in accordance with law.
>
> [62] Thus, before accusing an innocent person of the commission of a grave crime like the one punishable under s. 302 of the PC, an honest, sincere and dispassionate investigation has to be made and to feel sure that the person suspected of the crime alone was responsible to commit the offence. Therefore, greater care and circumspection are needed by the investigating agency in this regard.

[36] In *Ghasem Gharezadehsharbiani Hassan v. PP* [2014] 1 LNS 752; [2014] 5 MLJ 433, the Court of Appeal spoke on the significance of the role of an investigating officer as follows:

> [18] In spite of the importance of the telephone number, PW6 never investigated on Masoud. PW6 did not even make a call to the number given by the appellant on the excuse that 'saya terlepas pandang'. In our view, the conduct of PW6 is most unsatisfactory and unacceptable. *As an investigating officer, PW6 has an onerous responsibility to investigate all aspects and fairly, including feature of the case which not only favours the prosecution but also the appellant. The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth* (see *Jamuna Chaudhary & Ors v. State of Bihar* [1974] 3 Supreme Court Cases 774). The appellant cannot be penalised for lack of ingenuity in investigation by PW6 depriving him of the time honoured benefit of doubt (see *Pang Chee Meng v. Public Prosecutor* [1992] 1 MLJ 137). This was never considered by the learned trial judge. Consequently, the appellant's right to a fair trial has been compromised,

A which has the effect of rendering the conviction very unsafe. *The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure ora miscarriage of justice (see Mraz v. The Queen (1955)* 93 CLR 493 quoted with approval in *Lim Hock Boon v. Public Prosecutor* [2007] 1 MLJ 46). (emphasis added)

B **[37]** It is the finding of this court that the failure to investigate To Thi Quyen and Lee Boon Cheng has created a major gap in the prosecution's case and gives rise to more than one inference arising from the same facts. As such, the inference most favourable to the accused must be drawn.

[38] The law is clear in that the prosecution has a discretion to call C witnesses or not. However, that discretion must be exercised having regard to the interests of justice, which includes being fair to the accused and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based whether the effect of their testimony is for or against the prosecution (see: *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433). D Where a witness is a material witness and important to unfold the narrative of the prosecution's case, the failure to call such witness becomes fatal and creates a material gap in the prosecution's case.

[39] This court further finds that the prosecution has failed to prove the element of knowledge on the part of the accused. The prosecution herein E attempted to adduce ID78, a piece of paper said to be evidence of question and answer between PW7, the arresting officer and the accused which led to the discovery of the dangerous drugs in the premise.

[40] For reasons known best to the prosecution, ID78 was not tendered through the purported maker PW7, but was sought to be tendered through F the IO instead. ID78 was heavily challenged by the defence in that PW7's version of the existence of ID78 never existed. Of course, PW7 disagreed to the contention and relied on the fact that he had made a report relating to the question and answer between him and the accused (P41). However, ID78 was not recorded in any document including the search list and the handover G list by PW7. In his witness statement and oral evidence, PW7 stated that he had marked the piece of paper purportedly to be ID78 as "KB" and when confronted with ID78, the said marking is nowhere to be seen. All PW7 had to offer as an explanation was, "diakui berlaku kesilapan, Yang Arif. Saya tidak tulis." Prosecution's attempt to adduce ID78 as an exhibit becomes H hopeless when ID78 is dated two years before the accused was arrested and no amendment whatsoever was done to rectify the error. Hence, this court rejects ID78 to be admitted as evidence.

[41] This court is of the considered view that if not for the information received, the police would not have known to search the premise on the 16th I floor because there was no overt act on the part of the accused indicating his knowledge as to the whereabouts of the dangerous drugs. All the accused did

was to lead the police to the premise on the 16th floor upon being questioned as to the keys found in his pocket. In other words, without the accused's information as to the premise, the police would not have discovered the premise and the dangerous drugs. The fact that the accused led PW7 and his team to the premise at best would only show his knowledge of the premise but it cannot be said to connote his knowledge of the dangerous drugs therein. It must be borne in mind that the premise does not belong to the accused and neither was he the tenant. The premise belongs to Lee Boon Cheng. The act of the accused informing PW7 of the premise and merely took the police to the same without any overt act such as attempting to run *etc.* would only indicate his lack of knowledge of the dangerous drugs kept therein. Further, the IO (PW11) confirmed in his witness statement that even at the earliest stage the accused did not admit knowledge of the drugs found. PW7 for that matter testified that there is a possibility the acts of the accused is consistent with him not having any knowledge of the drugs found.

[42] The prosecution adduced CCTV images and argued that those images show the accused pushing a trolley with a bag on it and out of the elevator. P62 is a summary prepared by the IO which ends with the accused pushing in an empty trolley. This court finds that the CCTV images are neither here nor there. This court observes that at the very least what can be deduced from the images is that the bags were transported out and the trolley was empty when it was last seen. The bags are not the subject matter of this case as there is no confirmation that the bag seen from the CCTV images is the same bag containing the drugs in the present matter.

[43] It must be emphasised that all the evidence analysed in the above were mostly elicited from the suggestions made and answers given during cross-examination which were not challenge and it affects the prosecution case when the witnesses were not re-examined. The inference most favourable to the accused must be preferred by the court where inconsistent evidence is given by the prosecution witnesses which goes unchallenged by the prosecution. This legal principle was discussed by the Court of Appeal in *Tengku Adnan Tengku Mansor v. PP* [2022] 1 CLJ 917; [2022] 1 MLJ 93 as follows.

> If a witness comes to court and says an accused was not at the scene of the crime and did not commit the murder, as the accused was at that material time with him, obviously the prosecution needs to challenge the witness in re-examination. It affects the prosecution greatly if the witness is not re-examined.

[44] The Court of Appeal had acquitted and discharged the accused/appellant in *Azizan Yahaya v. PP* [2012] 8 CLJ 405; [2013] 1 MLJ 180 for failure of the prosecution to prove possession *inter alia* on the ground of failure to challenge the suggestions made by the accused/appellant therein to the prosecution witnesses. The Court of Appeal found:

A

> [9] We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to analyse or assess these testimonies. The prosecution has failed to discharge its bounden duty of excluding access to the appellant's room by others.

B

[45] The gaps in the prosecution case as outlined above has resulted in the prosecution failing to prove the essential ingredient of knowledge and possession on the part of the accused. Whenever the accused successfully put or avail himself to the opportunity to put his essential and material case in cross-examination and when there is no re-examination to challenge the accused's case, it follows that the truth of the prosecution case is doubted.

C

The Third Ingredient – Trafficking

[46] As possession is the gravamen of trafficking (to which prosecution has failed to prove), it follows that the prosecution has failed to prove that the accused was trafficking in the impugned dangerous drugs.

D

Conclusion

[47] Upon conducting a maximum evaluation of the prosecution evidence, this court finds that the prosecution has failed to prove the essential ingredient of knowledge and therefore possession of the dangerous drugs on the part of the accused and has thus, failed to prove the charge of trafficking against the accused person.

E

[48] The prosecution has thus, failed to make out a *prima facie* case against the accused for trafficking as charged and he was therefore acquitted and discharged without calling on him to make his defence.

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